No. 14545

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CECIL REGINALD JAY,

Appellant,

vs.

JOHN P. BOYD, District Director,
Immigration and Naturalization Service,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is conferred by Section 2241, Title 28, U.S.C. and on this Court by Section 2253, Title 28, U.S.C.

STATUTE INVOLVED

The statute involved is Section 244 of the Immigration and Nationality Act of 1952, Title 8, U.S.C.

1254, 66 Stat. 214. This statute is set forth in pertinent detail on page 3 of appellant's brief.

REGULATION INVOLVED

Title 8 C.F.R. Sec. 244.3, in pertinent part, is as follows:

> In the case of an alien qualified for suspension of deportation under Sec. 244 * * * the determination as to whether the application for suspension of deportation shall be granted or denied * * * may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.

STATEMENT OF THE CASE

Appellant, a native of England, last entered the United States in 1921. In 1949 he was arrested for deportation and during the course of deportation hearings in December, 1950, the Government charged that appellant was deportable by virtue of Section 22 of the newly enacted Internal Security Act of 1950, which provides for the deportation of aliens who since such entry, have become members of the Communist Party of the United States. At this hearing appellant admitted membership during the period from 1935 to 1940. On April 16, 1951 he was found

deportable and the Board of Immigration Appeals affirmed on December 5, 1952.

A petition for a writ of habeas corpus, attacking the deportation order was denied by the District Court, March 10, 1953. Thereafter appellant applied for a suspension of deportation under 8 U.S.C.A. 1254 (a) (5). After hearing, appellant was found statutorily eligible, however the hearing officer exercising his discretionary power under the statute denied appellant's application, stating in part, "However, after considering confidential information relating to the respondent as provided for under 8 C.F.R. 244.3, it is concluded that the respondent's case does not warrant favorable action and that his application for suspension of deportation be denied."

On April 9, 1954 appellant's appeal to the Board of Immigration Appeals was dismissed, and on July 14, 1954 the District Court denied appellant's petition and application for writ of habeas corpus attacking the denial of discretionary relief. Appellant has appealed from that order to this court.

QUESTIONS PRESENTED

Is Congress foreclosed from deporting an alien on statutory grounds adopted subsequent to his entry?

II

When an official, exercising the statutory discretion to suspend deportation, utilizes confidential information must he make a finding of its nature in exactly the terms of the applicable regulation?

SUMMARY OF ARGUMENT

Appellant argues that he cannot be constitutionally deported for a reason or on grounds which were not a condition of his entry. This is not a new argument and has been rejected by the Supreme Court in a long line of decisions beginning with the *Chinese Exclusion Case*, 130 U.S. 581 and continuing to the recent case of *Galvan v. Press*, 347 U.S. 522. Appellee is content to rest this portion of the argument on that line of cases.

The remainder of appellant's brief treats of the alleged denials of due process implicit in the handling of confidential information by the special inquiry officer and the Board of Immigration Appeals, in connection with the refusal of appellant's application for discretionary relief. It is charged specifically that the so-called confidential information is not confidential in nature; and further, that even if it is confidential, that no recital of the fact that its disclosure would be prejudicial to the public interest, safety or security was made.

It is well settled that the Attorney General or his representative may consider confidential information in the exercise of his discretion to suspend deportation. Title 8 C.F.R. 244.3 was designed to establish a basis for the use of confidential information by the delegatee. In the present proceedings the regulation was followed in detail by the special inquiry officer inasmuch as he specifically incorporated the regulation by reference.

Appellants attempt to prove below that the information was not confidential was an impossible task because only by the wildest speculation could appellant hope to define what could not even be revealed to the Court.

Perhaps it is harsh to suggest that appellant could not be injured or prejudiced even assuming the truth of his alleged requirement that an exact finding was necessary; however, the plain truth is that the Court, much less the appellant cannot have the privilege of considering information found confidential by officials of the executive branch.

Basic, however, to all arguments concerning the administration of discretionary relief, is the necessary consideration of the nature of the relief requested. The alien has been found deportable in a separate proceeding, and is now asking for an act of grace which

will be granted or withheld according to the considered opinion of the delegatee. Clearly a court ought not to interfere in the absence of obvious unfairness.

ARGUMENT

I

May the appellant be deported for a cause which was not made a condition at the time of his entry into the United States?

The appellant contends deportation under such circumstances is without constitutional sanction; that the question has never been clearly analyzed by the Supreme Court; that it has been assumed that the power to provide for the removal of aliens is a broad general power arising out of sovereignty. The appellant's theory has its origin in the dissenting opinion of Mr. Justice Brewer in *Fong Yue Ting v. The United States*, 149 U.S. 698, 732, 737 (1892). A majority of the court rejected the doctrine approved by Mr. Justice Brewer, and the Supreme Court in an unbroken chain of decisions from that time until the present has rejected any attempt to place a limitation upon the sovereign in dealing with aliens. The plenary power of Congress has been time and again sustained by the Supreme Court.

Harisiades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 511, 96 L.Ed., 586.

Mr. Justice Jackson dissenting in *Shaughnessy v. The United States*, 345 U.S. 206, 222, 73 S.Ct. 634, 97 L.Ed. ..... discussing substantive due process, at page 222, stated:

> "Due process does not invest any alien with a right to enter the United States, nor confer on those admitted the right to remain against the national will. Nothing in the Constitution requires admission or sufferance of aliens hostile to our scheme of government."

More recently in *Galvan v. Press*, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911, the plenary power of Congress was again reviewed by the Supreme Court, two members dissenting. Mr. Justice Frankfurter, speaking for the majority, said:

> "As to the extent of the power of Congress under review, there is not merely 'a page of history,' *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. *The Japanese Immigrant Case*, 189 U.S. 86, 101; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."

The wisdom of this conclusion is obvious as to hold otherwise would limit the sovereign power of the Unit-

ed States to deal with aliens in our midst who are dedicated in the destruction of our form of government.

II

Was the appellant denied procedural due process of law?

The appellant asserts that he was denied procedural due process of law because the special inquiry officer and the Board of Immigration Appeals did not expressly state in writing that they found the confidential information upon which they relied to deny discretionary relief to be of such a nature that disclosure would be projudicial to the public interest, safety, or security. It is the position of the government that the special inquiry officer and the Board of Immigration Appeals each found and were of the opinion that the confidential information, if disclosed, would be prejudicial to the public interest, safety, or security, and that they did so in a manner consistent with the statute, regulations, and the requirements of the procedural due process. The area of controversy seems to be limited to the manner in which the special inquiry officer and the Board of Immigration Appeals manifested its opinion in this respect. The statute is silent concerning any finding which the appellant asserts due process requires, providing merely,

> "As hereinafter prescribed in this section, the Attorney General may in his discretion suspend deportation * * *," Section 244(a), Immigration and Nationality Act of 1952, 66 Stat. 214 (8 U.S.C.A. 1254).

The regulations do not provide for any finding that the disclosure of such information would be prejudicial to the public interest in the sense that the appellant asserts (8 C.F.R. 244.3, and 17 F.R. 11517 of December 19, 1952), but merely provides that confidential information does not have to be disclosed where the officer or the Board is of the opinion that it would be prejudicial to the public interest, safety, or security. The District Court found, as a matter of law, that this regulation should not be construed to impose implied conditions or restrictions upon the Board or the special inquiry officer (Record, p. 18). Both the special inquiry officer and the Board indicated in their written opinions that they were relying on confidential information, the nature of which was described by the above regulation. The special inquiry officer, in his opinion, stated specifically that he was denying suspension,

> "After considering confidential information relating to the respondent, as provided for under 8 C.F.R. 244.3." (Record 16).

The Board of Immigration Appeals, after reviewing the record of hearing, and the decision of the special inquiry officer, stated:

> "Upon a full consideration of the evidence of record and in light of the confidential information available, it is concluded that the alien is not entitled to discretionary relief." (R. 17).

It is plain that the hearing officer did form an opinion that the nature of the confidential information was such that disclosure would be prejudicial to the public interest. The word "finding" is not used in the regulation. Therefore, the failure to use the specific language, in the opinion of the hearing officer, could not be regarded as a violation of the regulation.

Where the hearing officer stated that he is acting pursuant to such regulation, requiring the exercise of his judgment and the formulation of his opinion, it is presumed that he is performing his duties in accordance with the regulation in the absence of a contrary showing.

> *Cunard SS. Co. v. Elting*, 97 F. 2d 373, C.C.A. 2-1938 (18 A.L.R. 2d 625).

When the Board of Immigration Appeals adopted this opinion, it is presumed that they were acting in the same manner.

The finding such as the appellant claims should have been made in order to satisfy the requirements of due process would not have contributed to the essential fairness of the hearing because, regardless of what language might have been used in order to indicate compliance with the regulation, the appellant still would have been foreclosed from further inquiry because of the confidential nature of the information. The appellant does not contend that he was denied due process because such confidential information was used. Further, whether or not the confidential information was of such a nature as to be prejudicial to the public interest was not a matter which was the subject of adjudication in the sense that a finding was required to be made after definite issues of law and fact had been tried at a hearing *(Dolenz v. Shaughnessy*, 206 F. 2d 392), it was a collateral matter concerned primarily with the exercise of discretion and not within the broad general rule prohibiting the consideration of matters outside the record 18 A.L.R. 2d 571, 586, Sec. 14.

Judge Learned Hand considering a similar question in *U. S. ex rel Kaloudis v. Shaughnessy*, 180 F. 2d, 489, C.A. 2, 1950. In this case the Board refused to grant suspension because the alien was a member of an organization appearing on the proscribed list issued by the Attorney General, The International

Workers Order. The alien contended that unless he was granted a hearing to determine whether the Attorney General had adequate grounds for proscribing the organization, he would be denied due process of law. The court held that the alien had no constitutional right to such a hearing and that any legally protected interest he had, had been forfeited by due process of law, reasoning that the only legally protective interest or right he had related to the hearing to determine deportability and the hearing to determine eligibility under the statute for suspension of deportation. More recently, in *United States v. Mackey*, 210 F. 2d 160, C.A. 2, 1954, Cert den., 347 U.S. 967, 74 S.Ct. 778, 98 L.Ed. ..... the Second Circuit amplified this distinction between the use of confidential information in determining statutory eligibility for suspension and the use of such information for its bearing on the formulation of a discretionary decision. The Second Circuit here follows the Kaloudis case where Judge Hand pointed out that the power of the Attorney General to suspend deportation was a dispensing power, a matter of grace over which the courts had no review, and that the alien had no legally protected right to a hearing as to the adequacy of the Attorney General's reasons for denying suspension in the exercise of discretion.

CONCLUSION

For the foregoing reasons it is respectfully urged that the decision of the court below be affirmed.

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